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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1983

MICHAEL ALBERT KALY,
Petitioner

-vs-

THE PEOPLE OF THE STATE OF MICHIGAN,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

Michigan Court of Appeals Nos. 58257 & 60173

CARL ZIEMBA
Attorney for Petitioner
Business Address:
2000 Cadillac Tower
Detroit, Michigan 48226
Telephone: (313) 962-0525

AMERICAN PRINTING COMPANY
1200 WEST FORT STREET, DETROIT, MICHIGAN 48226 — (313) 963-9310

QUESTIONS PRESENTED

I

Whether petitioner's double jeopardy protection under the Fifth Amendment to the United States Constitution was violated when he was convicted of possession of a firearm in the commission of a felony and the underlying felony when by statutory definition the underlying felony could only have been committed by the use of a firearm.

II

Whether petitioner's double jeopardy protection under the Fifth Amendment to the United States Constitution was violated when he was tried a second time after the trial court granted petitioner a new trial on the basis that the prosecutor had deliberately made prejudicial statements before the jury of a testimonial nature because the prosecutor had failed to call a witness who could have testified to the facts supplied by the prosecutor.

III

Whether petitioner was deprived of due process and a fair trial under the 14th Amendment when the trial court in supplemental instructions told the jury that accident was not a defense to a charge of involuntary manslaughter after having told the jury in the court's main charge that accident was a defense to involuntary manslaughter and after petitioner's counsel had argued a theory of accident to the jury.

TABLE OF CONTENTS

	Page
STATEMENT OF QUESTIONS PRESENTED	i
AUTHORITIES CITED	iii
JURISDICTION OF THE COURT	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
STATEMENT OF PERTINENT FACTS	4
REASONS FOR GRANTING WRIT	6
I	6
II	11
III	15
CONCLUSION	16
RELIEF SOUGHT	16
APPENDIX:	
Opinion of the Michigan Court of Appeals in Nos. 58257 & 60173 Sought to be reviewed	1a
Order of the Michigan Supreme Court denying Leave to Appeal dated May 19, 1983	6a
Order of Michigan Supreme Court denying Reconsideration of Order Denying Leave to Appeal dated August 15, 1983	8a

AUTHORITIES CITED

Cases: Page

Blockburger v *United States*, 284 US 299 (1932) ... 9, 10

Cool v *United States*, 409 US 100 (1972) 16

Cupp v *Naughten*, 414 US 141 (1974) 16

Lee v *United States*, 432 US 23 (1977) 13

Missouri v *Hunter*, ___ US ___, 103 S Ct 673 (1983) 9

Oregon v *Kennedy*, ___ US ___, 102 S Ct 2083 (1982) 13, 14, 15

United States v *Dinitz*, 424 US 600 (1976) 15

United States v *Jorn*, 400 US 470 (1970) 15

United States v *Tateo*, 377 US 463 (1964) 15

Wade v *Hunter*, 336 US 684 (1949) 13

Wayne Prosecutor v *Recorder's Court Judge*, 406 Mich 374 (1979) 7, 8, 10

Whalen v *United States*, 445 US 684 (1980) 10

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5th Amend, US Constit 1, 9, 13

14th Amend, US Constit 1, 16

Michigan Compiled Laws Annotated 750.329 ..... 2, 5, 6, 7, 8, 10, 15, 16

Michigan Compiled Laws Annotated 750.227b ... 3, 6, 7

28 USC 1254 1

JURISDICTION OF THE COURT

The opinion and judgment of the Michigan Court of Appeals is dated July 1, 1982 and it was entered on July 1, 1982. The opinion is unpublished.

A timely application for leave to appeal filed by petitioner in the Michigan Supreme Court was denied by Order of that Court dated May 19, 1983.

A timely application for reconsideration of the Order dated May 19, 1983 filed by petitioner in the Michigan Supreme Court was denied by Order of that Court dated August 15, 1983.

Jurisdiction to review the judgment of the Michigan Court of Appeals, it is believed, is conferred upon this Court by *28 USC 1254*.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment 5, United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 14, Section 1, United States Constitution:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case originated in the Circuit Court for the County of Wayne, State of Michigan, seated in the City of Detroit, Michigan, a court of general jurisdiction including jurisdiction over felonies committed in the County of Wayne.

Petitioner was initially charged in a two-count information filed in this case with the commission of the offenses of (1) murder of the second degree in the shotgun slaying of one Daniel John McDonald; and (2) possession of a firearm in the commission of a felony.

The case was tried to a jury and petitioner was convicted of the offenses of (1) manslaughter and (2) possession of a firearm in the commission of a felony.

On petitioner's motion for a new trial, the trial court granted petitioner a new trial.

On petitioner's second trial, petitioner was faced with the charges of (1) manslaughter and (2) possession of a firearm in the commission of a felony. The second trial was tried to a jury.

The jury convicted petitioner, not of manslaughter, but of involuntary manslaughter under a statute known as *Michigan Compiled Laws Annotated 750.329* which stated that if a person pointed or aimed any firearm at another intentionally but without malice and the firearm discharged the ensuing death was manslaughter. And the jury also convicted petitioner of possessing a firearm in the commission of a felony.

Petitioner filed a post-conviction motion in the trial court praying the vacation of his conviction for possession of a firearm in the commission of a felony for the reason that petitioner's right under the double jeopardy clauses of the constitution of the State of Michigan and of the federal constitution was violated when he was convicted of both involuntary manslaughter under *MCLA 750.329* and of possession of a firearm in the commission of a felony under

MCLA 750.227b since the elements of both crimes of which he was convicted were the same and petitioner was subjected to a mandatory two-year prison term on the felony firearm conviction which mandatorily ran consecutively to any sentence imposed for the involuntary manslaughter conviction.

The trial court granted petitioner's motion and entered an order vacating petitioner's conviction under the felony firearm statute, *MCLA 750.227b*.

The trial court sentenced petitioner to a term of 5 years to 15 years on the involuntary manslaughter conviction.

Petitioner appealed his involuntary manslaughter conviction as a matter of right to the Michigan Court of Appeals.

The Michigan Court of Appeals granted the People of the State of Michigan leave to appeal from the order of the trial court vacating petitioner's conviction for felony firearm under *MCLA 750.227b*.

In an unpublished *per curiam* opinion dated July 1, 1982 in Docket Nos. 58257 & 60173, the Michigan Court of Appeals affirmed petitioner's conviction for involuntary manslaughter under *MCLA 750.329* and remanded the case 'to the Wayne County Circuit Court with directions to reinstate defendant's felony-firearm conviction and for resentencing'.

The trial court granted petitioner's motion to hold in abeyance resentencing under the mandate of the Michigan Court of Appeals until at least the Michigan Supreme Court ruled on petitioner's application for leave to appeal.

Petitioner filed an application for leave to appeal from the opinion and judgment of the Michigan Court of Appeals in the Michigan Supreme Court, and this application was denied by Order dated May 19, 1983.

Petitioner then filed a motion for reconsideration of the Order of May 19, 1983 in the Michigan Supreme Court, and this motion was denied by Order dated August 15, 1983.

At date hereof, petitioner has not been sentenced on the felony firearm conviction. Sentencing has been set for October 6, 1983.

STATEMENT OF PERTINENT FACTS

Petitioner was initially charged in a two count information in this case with the commission of the offenses of (1) murder of the second degree in the shotgun slaying of one Daniel John McDonald; and (2) possession of a firearm in the commission of a felony.

The case was tried to a jury and petitioner was conivcted of (1) voluntary manslaughter and (2) possession of a firearm in the commission of a felony.

Petitioner moved the trial court for a new trial on the basis that the prosecutor had deliberately made statements of a testimonial nature prejudicial to the petitioner in his argument to the jury. The trial court granted petitioner's motion for a new trial.

Prior to the second trial, petitioner filed a motion to dismiss the information on the basis that retrial of petitioner would violate his right under the 5th Amendment to the United States Constitution not to be placed twice in jeopardy for the same act. Petitioner's theory was that the grant of a new trial was procedurally equivalent to the court's granting of petitioner's motion for a mistrial made on trial on the same basis as the new trial motion and since the prosecutor's action was deliberate and designed to force a mistrial, retrial of petitioner was barred under the double jeopardy clause. The trial court denied this motion.

On petitioner's second trial, petitioner was faced with the charges of (1) voluntary manslaughter and (2) possession of a firearm in the commission of a felony.

The second trial was to a jury.

Evidence was adduced that petitioner was a businessman without any criminal record whatsoever. He owned and conducted a bar business. On the morning in question, petitioner had closed the doors of his establishment in accordance with the dictates of law and his customers were consuming whatever beverages they had ordered prior to cut-off time. After the doors were closed and locked, deceased and a friend came pounding on the doors demanding admittance. Petitioner explained that the bar was closed and that they should go home. There was evidence that the deceased and his friend had locked their keys in their car and wanted a coat hanger in order to open the lock on the door of their car. The banging persisted; petitioner shouted through the doors several times that the bar was closed. Petitioner then heard noises outside which suggested to his mind that deceased and his friend were vandalizing his property in anger at having been refused admittance. Petitioner armed himself with a shotgun and went outside. He confronted the two and told them that the bar was closed and that they should go home. Petitioner testified that he had armed himself because he did not know who it was who had been trying to get into the bar and he didn't know their purpose which might have been to rob him and his patrons, and that he was acting in defense of his person, of his patrons and of his property. During the confrontation, the shotgun discharged and deceased was struck and killed. Petitioner testified that he thought that the deceased was making a gesture toward him with an object in his hand and that petitioner jumped back to avoid danger and that the butt of the shotgun struck the wall of the building and that the shotgun went off killing deceased. Petitioner testified that the discharge of the shotgun was an accident.

The prosecutor asked for jury instructions on voluntary manslaughter and for instructions on the type of involuntary manslaughter defined under *MCLA 750.329*. Petitioner objected to instructions on involuntary manslaughter under the statute unless the court agreed that accident was a defense to the charge of involuntary manslaughter under the statute

MCLA 750.329. The court agreed that accident was a defense to the charge under the statute and that the court would so instruct the jury.

Petitioner argued to the jury that petitioner was to be excused on all charges — voluntary manslaughter and involuntary manslaughter under the statute — because the discharge of the shotgun was accidental.

The court instructed the jury that accident was a defense to the charge of involuntary manslaughter under *MCLA 570.329*.

After deliberating a while, the jury returned to the courtroom and sought additional instruction on involuntary manslaughter. In supplemental instructions, the trial judge for the first time told the jury that accidental discharge of the shotgun was not a defense to the charge of involuntary manslaughter under the statute *MCLA 750.329*.

Five minutes later, the jury returned verdicts of guilty of (1) involuntary manslaughter under *MCLA 750.329*; and (2) possession of a firearm in commission of a felony.

REASONS FOR GRANTING THE WRIT

I

The Michigan felony firearm statute, *MCLA 750.227b*, reads as follows:

> '(1) A person who carries or has in his possession a firearm at the time he commits or attempts to commit a felony, except the violation of section 227 or 227a [carrying a concealed weapon and a licensed private guard carrying his firearm while off duty], is guilty of a felony, and shall be imprisoned for 2 years. Upon a second conviction under this section, the person shall be imprisoned for 5 years. Upon a third or subsequent conviction under this section, the person shall be imprisoned for 10 years.

'(2) The term of imprisonment prescribed by this section shall be in addition to the sentence imposed for the conviction of the felony or that attempt to commit the felony, and shall be served consecutively with and preceding any term of imprisonment imposed for the conviction of the felony or attempt to commit the felony.

'(3) The term of imprisonment imposed under this section shall not be suspended. The person subject to the sentence mandated by this section shall not be eligible for parole or probation during the mandatory term imposed pursuant to subsection (1).'

The statute under which petitioner was convicted of involuntary manslaughter, *MCLA 750.329*, reads as follows:

'Any person who shall wound, maim or injure any other person by the discharge of any firearm, pointed or aimed, intentionally but without malice, at any such person, shall, if death ensue from such wounding, maiming or injury, be deemed guilty of the crime of manslaughter.'

The intent of the Michigan legislature in adopting the felony firearm statute, *MCLA 750.227b*, was to deter the use of guns in the commission of felonies that might be committed with a gun but not necessarily committed with a gun. Robbery armed, murder, assault with intent to commit murder — all may be committed without the use of a firearm. The use of a firearm in the commission of such offenses enhances the danger to the public safety. All this was made clear by the Michigan Supreme Court in *Wayne Prosecutor* v *Recorder's Court Judge*, 406 Mich 374, 391 (1979):

'The language employed by the Legislature in the felony-firearm statute . . . leaves no doubt that the Legislature intended to make the carrying of a weapon during a felony a separate crime and intended that cumulative penalties should be imposed. The Legislature has clearly expressed its judgment that carrying a

> firearm during any felony which may, but need not necessarily, involve the carrying of a firearm, entails a distinct social harm inimical to the public health, safety and welfare which deserves separate treatment. In order to deter the use of guns, the Legislature has chosen to create a separate crime.'

It is clear from the opinion of the Michigan Supreme Court in *Wayne Prosecutor* that the intent of the Michigan legislature in adopting the felony firearm statute was to prescribe separate and consecutive punishment for the commission of a felony while in possession of a firearm when the committed felony does not from its very nature involve the carrying of a firearm.

For example, an armed robbery can be committed by assaulting another with a knife, or with a club, or with an axe. The legislature decided that such assaults where inherently less dangerous to life than an armed robbery involving an assault with a firearm, and the legislature prescribed an additional and consecutive punishment for the carrying of a firearm during the commission of a felony whose commission did not in the nature of the felony involve the carrying of a firearm.

That the Michigan legislature did not intend to include in its proscription in the felony firearm statute those felonies which necessarily involved the carrying of a firearm is found in the fact that the felony firearm statute specifically excepted from its provisions (1) the offense of carrying a pistol concealed on the person and (2) the offense of a licensed private guard carrying his pistol on his person while off duty — offenses which necessarily involved the carrying of a firearm.

The specie of involuntary manslaughter of which petitioner was convicted by statutory definition could only be committed by the use of a firearm. The statute — *MCLA 750.329* — specifically provides that 'Any person who shall wound . . . by the discharge of any firearm . . . if death shall ensue' be deemed guilty of manslaughter.

Hence, it is clear by the interpretation of the Michigan Supreme Court of the legislative intent behind the Michigan felony firearm statute that the legislature did not intend to prescribe separate and consecutive punishment for the possession of a firearm in the commission of a felony which necessarily involved the carrying of a firearm. This Court is 'bound to accept the [state] court's construction of that State's statutes', *Missouri* v *Hunter*, ___ US ___, 103 S Ct 673, 679 (1983).

In the case at bar, it is clear that the sentencing court will sentence petitioner to a separate and consecutive sentence of two years on the felony firearm conviction because the sentencing court is under mandate of the Michigan Court of Appeals to do so. [At date hereof, petitioner has not yet been so sentenced because the sentencing court held in abeyance the resentencing of petitioner under the judgment of the Michigan Court of Appeals until the Michigan Supreme Court ruled on petitioner's application for leave to appeal and this action was taken just a few days ago. The sentencing court has set resentencing for October 6, 1983.]

But the sentencing of petitioner to a consecutive two year term on the felony firearm conviction will violate the petitioner's rights under the Double Jeopardy Clause of the *Fifth Amendment*.

The Double Jeopardy Clause 'prevent[s] the sentencing court from prescribing greater punishment than the legislature intended', *Missouri* v *Hunter*, *supra*, at 103 S Ct 678.

Since the Michigan legislature did not intend to prescribe separate and consecutive punishment for the carrying of a firearm in the commission of a felony which necessarily involved the carrying of a firearm, the sentencing court is constrained by the principles of *Blockburger* v *United States*, 284 US 299, 304 (1932):

> 'The applicable rule is that where the same act or transaction constitutes a violation of two distinct statut-

> ory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.'

In the case at bar, to prove involuntary manslaughter under *MCLA 750.329* it was necessary to prove that the accused aimed a firearm without malice at another, the discharge of the firearm, the wounding of the other, and the ensuring death. To prove the felony firearm offense, it was necessary to prove that the accused carried a firearm, that he aimed it without malice at another, that it discharged, the wounding of the other and the ensuing death. But the carrying of the firearm was already contained in the aiming of a firearm at another. Hence, neither offense required the proof of a fact which the other did not.

The Michigan Court of Appeals disposed of the *Blockburger* issue as follows:

> 'The constitutional test of *Blockburger* v *United States*, . . . is satisfied because in order to convict defendant of involuntary manslaughter the prosecution would have to prove, (1) that the defendant wounded, maimed, or injured another person, (2) that he did so by the discharge of any firearm, (3) that the firearm was pointed or aimed, intentionally but without malice at such person, and (4) that such 'person died from the wounds inflicted. To convict the defendant of a felony-firearm violation, the prosecution was legally required to prove, (1) that defendant carried or possessed a firearm, and (2) that the firearm was carried or possessed during the commission of *any* felony or attempted felony. Despite the substantial overlap in the proofs required to establish these crimes. *Blockburger* and *Wayne Prosecutor* mandate our finding that there was no double jeopardy violation here.' Appendix, page 2a.

The same type of argument was considered and rejected in a double jeopardy context by this Court in connection with a similar District of Columbia statute in *Whalen* v *United States*, 445 US 684, 694 (1980).

II

On the first trial, one of the most hotly contested points was whether the deceased and his companion had inadvertently locked the keys of their car in the car. This point had a bearing on the purpose of the two men banging on the door of petitioner's place of business after closing hours.

An important question bearing on the point was whether a police officer who had responded to the scene after the shooting had used a tool to gain entry into the locked car and had found the car keys inside. The police officer or officers who allegedly performed this act were not called as witnesses by the prosecution. Instead, another police officer who was called testified that he had seen this act performed. Defense counsel on cross-examination asked the officer whether the observation of the entry into the car had been noted in his police report made of the investigation. The officer testified that it had. When challenged to find such entry in the police report, the officer testified that he could not find it in the police report.

In his argument to the jury, defense counsel made capital of this fact to support defendant's theory that the deceased had not inadvertently locked his keys in the car and had come to petitioner's door with other things in mind than to obtain a coat hanger to open the car door. In his rebuttal argument, the prosecutor told the jury:

> '[Defense counsel] goes into a big deal about the hanger and the key being locked in the car. Disregarding, of course, the testimony of the officer in charge of the case that stood right there when that key was removed. Gave him a report. Said, read it and find where that is in your report. And he had it in the report. And the officer read it and he couldn't find it . . . The report which I hold in my hand, which is Sergeant Lokuta's report, was shown to defense counsel as soon as he got off the stand, indicating quite clearly the evidence that the key was removed by another officer. Shown to him the minute he got off the stand.' (Trial Tr 88-89)

There was an immediate objection by defense counsel. A long colloquy ensued between court and counsel, all in the presence of the jury. The prosecutor expressed his purpose in making his challenged statements:

> 'I think when you have in the impression that the officer has stated that a report is in existence, that the defense knows is in existence, he creates an impression that doesn't exist, with full knowledge that it does, your Honor, I think it is a matter that should be corrected. I didn't know he was going to argue that to the jury, all of this missing evidence that he talks about.' (Trial Tr 115)

The trial court clearly established that the statements of the prosecutor were testimonial in nature, that the substance of his assertions were not matters of record, and that the prosecutor had deliberately gone beyond the record to counter defense counsel's argument. At the conclusion of the jury arguments, defense counsel moved the court to declare a mistrial. The motion was denied.

Petitioner filed a post-conviction motion seeking a new trial. The trial court granted the motion after making the following remarks, among others:

> 'Many times as I read this, however, I can't say that there was not a reference both before and after the instructions [curative], to the fact that the prosecutor had managed to refer to a matter that was not in evidence. And to this day, I can't account for why that was done, other than angry (sic), I suppose, over the perception of what defense counsel was saying to the jury. I don't know how to get around that, to tell you the truth. The most significant part of the case is whether or not the men went to the premises for the purpose of getting a hangar (sic), or whether they went there with belligerance, or something else. I suppose it is true that the witness who was supposed to retrieve the keys was not endorsed, and didn't testify. And it was the report that referred to the retriever of those keys, was the one about which the prosecutor informed the jury.' (Tr Extract of Motion, 2-3)

After the trial court granted petitioner a new trial, petitioner filed a motion to dismiss the information on double jeopardy grounds, petitioner's position being that the prosecutor had deliberately made his improper remarks to the jury in order to provoke a mistrial so that he could call on a second trial the two officers who had made the entry into the car and who the prosecutor had failed to endorse as witnesses on the first trial.

In support of his motion for dismissal, petitioner pointed out to the trial court that after the grant of the new trial, the prosecutor had indeed obtained an ex parte order of the court allowing the prosecutor to endorse as witnesses on the people's information the names of the two police officers who allegedly made the entry into deceased's car.

The trial judge denied petitioner's motion for dismissal.

On petitioner's second trial, the two police officers who were not called on the first trial were called on the second trial and testified adversely to defendant that they had forced entry into deceased's car and removed the keys therefrom.

Petitioner maintains that the granting of petitioner's motion for a new trial after the first trial on the same basis upon which petitioner moved for a mistrial was procedurally the same as though the trial court had granted the motion for a mistrial. Cf *Lee* v *United States*, 432 US 23 (1977) where the Court regarded a motion to dismiss as a motion for a mistrial.

Although petitioner's 'valued right to have his trial completed by a particular tribunal', *Wade* v *Hunter*, 336 US 684, 689 (1949) was not violated in petitioner's first trial, certain other rights of petitioner under the Double Jeopardy Clause of the Fifth Amendment which were peripherally touched upon in *Oregon* v *Kennedy*, ___ US ___, 102 S Ct 2083 (1982) were violated.

But petitioner urges to this Court that he cannot be deprived of those favorable consequences which would have flowed to him — a bar to a second trial, for example — which would have occurred had the trial court granted his motion for a mistrial during trial rather than his motion for a new trial simply because the trial court erred in the denying of petitioner's motion for a new trial.

Had the trial judge granted petitioner's motion for a mistrial, petitioner could have argued in bar of a second trial that (1) the prosecutor's action was deliberate and willful and done with intent to goad petitioner into moving for a mistrial, (2) the prosecutor's action was deliberate and willful and designed to prevent the acquittal of petitioner, (3) that the prosecutor's action was deliberate and willful and done with intent to cause a mistrial, and that the prosecutor's action was designed to obtain a second, more favorable opportunity to convict petitioner.

Thus, petitioner should be able under the circumstances of the case at bar to urge that he should not have been tried a second time because it is clear from the facts of the case that the prosecutor's statements to the jury were not inadvertent; they were made consciously, deliberately, with the specific intent of countering what the prosecutor perceived to be a devastating argument by defense counsel. The statements were made at the very end of the case in the prosecutor's rebuttal argument after all the evidence had been presented to the jury and after defense counsel had made his final argument to the jury. The intent of the prosecutor can be inferred and found to be a fact from the 'objective facts and circumstances' of this case, *Oregon* v *Kennedy*, *supra*, 102 S Ct at 2089, and that intent was to cause a mistrial.

The knowing, deliberate and willful making of the statements to the jury by the prosecutor loudly and clearly bespeak an intent to goad the petitioner into moving for a mistrial, and when the defendant in a case is goaded into moving for a mistrial, he may 'raise the bar of Double Jeopardy to a second trial', *Oregon* v *Kennedy*, *supra*, 102 S Ct at 2089.

It is clear from the facts and circumstances of this case that the prosecutor realized at the end of the trial that he had failed to adduce crucial testimony on behalf of the prosecution by not endorsing and calling the two police officers who made entry into the deceased's car, and that the prosecutor made his improper statements to the jury 'from a fear that the jury was likely to acquit the accused', *United States* v *Tateo*, 377 US 463, 468 n 3 (1964), quoted in *Oregon* v *Kennedy*, *supra*, 102 S Ct 2088, n 4.

'[W]here a defendant's mistrial motion is necessitated by judicial or prosecutorial impropriety designed to avoid an acquittal, reprosecution might well be barred', *United States* v *Jorn*, 400 US 470, 485 n 12 (1970), quoted in *Oregon* v *Kennedy*, *supra*, 102 S Ct at 2083.

From the fact that immediately after the granting of a new trial to petitioner the prosecutor endorsed the names of the two police officers who made entry into deceased's car on the people's information as witnesses for the second trial — the failure of the prosecutor to call whom on the first trial created in the mind of the prosecutor a desperate need to make the improper statements to the jury — it may be objectively determined that 'the bad faith conduct' of the prosecutor 'afford[ed] the prosecution a more favorable opportunity to convict' the petitioner, *United States* v *Dinitz*, 424 US 600, 611 (1976), quoted in *Oregon* v *Kennedy*, *supra*, 102 S Ct at 2088.

III.

Prior to final arguments to the jury, the court agreed, upon petitioner's request, to instruct the jury that accident was a defense to the charge of involuntary manslaughter under *MCLA 750.329*.

Defense counsel argued to the jury that deceased's death was accidentally caused.

The trial judge instructed the jury that accident was a defense of the charge of involuntary manslaughter.

After the jury had deliberated for some time, they returned to the courtroom and asked for further instructions. In a supplemental charge, the trial judge for the first time instructed the jury that accident was NOT a defense to the charge of involuntary manslaughter under *MCLA 750.329*.

This supplemental instruction so infected the trial with unfairness as to have deprived petitioner of due process and a fair trial under the *14th Amendment*. *Cupp* v *Naughten*, 414 US 141 (1974); *Cool* v *United States*, 409 US 100 (1972).

CONCLUSION

It is respectfully urged to this Court that the foregoing issues involve important questions of federal constitutional law that should be settled by this Court.

RELIEF SOUGHT

Petitioner respectfully prays this Court issue its Writ of Certiorari to the Michigan Court of Appeals.

Respectfully submitted,
Carl Ziemba
Attorney for Petitioner
Business Address:
2000 Cadillac Tower
Detroit, Michigan 48226
Telephone: (313) 962-0525

Detroit, Michigan
September 22, 1983

APPENDIX

Opinion of the Michigan Court of Appeals

STATE OF MICHIGAN
COURT OF APPEALS
(Filed July 1, 1982)

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

-v- No. 58257

MICHAEL ALBERT KALY,
Defendant-Appellant.

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

-v- No. 60173

MICHAEL ALBERT KALY,
Defendant-Appellee.

BEFORE: S.J. Bronson, P.J., D.F. Walsh and C.W. Simon*, JJ. PER CURIAM

After a second jury trial, defendant was convicted of involuntary manslaughter and felony-firearm and sentenced to serve from 5 to 15 years imprisonment. The trial court vacated Kaly's felony-firearm conviction on double jeopardy grounds. Both parties have appealed.

The first issue raised challenges the propriety of the trial court's dismissal of the felony-firearm conviction on double jeopardy grounds. We find that, on the basis of *Wayne County Prosecutor* v *Recorder's Court Judge*, 406 Mich 374; 280 NW2d 793 (1979), the trial court erred in vacating defendant's felony-firearm conviction. *People* v *Mahone*, 97 Mich App 192, 195; 293 NW2d 618 (1980).

The constitutional test of *Blockburger* v *United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932), is satisfied because in order to convict defendant of involun-

* Circuit judge, sitting on the Court of Appeals by assignment.

tary manslaughter the prosecution would have to prove, (1) that the defendant wounded, maimed, or injured another person, (2) that he did so by the discharge of any firearm, (3) that the firearm was pointed or aimed, intentionally but without malice at such person, and (4) that such person died from the wounds inflicted. To convict the defendant of a felony-firearm violation, the prosecution was legally required to prove, (1) that defendant carried or possessed a firearm, and (2) that the firearm was carried or possessed during the commission of *any* felony or attempted felony. Despite the substantial overlap in the proofs required to establish these crimes, *Blockburger* and *Wayne Prosecutor* mandate our finding that there was no double jeopardy violation here.

Next, defendant argues that the second trial, granted him on his motion for a new trial after an earlier conviction, placed him twice in jeopardy. We disagree because, after a full review of the record, we find that the ruling by the trial court was not a belated decision to grant a mistrial because of prosecutorial overreaching or bad faith. *United States* v *Dinitz*, 424 US 600, 606; 96 S Ct 1075; 47 L Ed 2d 267 (1976), *United States* v *Jorn*, 400 US 470, 485; 91 S Ct 547; 27 L Ed 2d 543 (1971).

Defendant next alleges that the trial court erred in refusing to instruct the jury that accident was a complete defense to a charge of involuntary manslaughter. Defendant's argument makes no sense as the gravamen of involuntary manslaughter is a culpable accidental killing. Where the weapon is intentionally aimed or pointed, its discharge is simply not excused by accident. *People* v *West*, 408 Mich 332, 343; 291 NW2d 48 (1980), *People* v *Richardson*, 409 Mich 126, 140-141; 293 NW2d 332 (1980), *People* v *Newman*, 107 Mich App 535, 547-548; 309 NW2d 657 (1981), Bronson, dissenting. The defense of accident in a criminal case charging involuntary manslaughter is available only as a defense to the element of intentionally aiming

or pointing a firearm, but not the discharge of the weapon. The instruction of the trial court was proper.

Defendant also argues that the trial judge changed his mind on the applicability of the accident defense. Our review of the record made at trial convinces us that the trial judge acted properly in instructing the jury. Here, defense counsel requested a jury instruction on accident as a defense to the crimes charged. There was a lengthy discussion as to the definition of accident and its applicability to the charge of negligent use of a firearm with injury or death resulting. After the trial judge agreed to defendant's definition of accident in this context, defense counsel asked the judge if he would instruct the jury that accident is a defense to voluntary manslaughter and involuntary manslaughter, to which the trial court responded affirmatively.

The prosecutor then proceeded to give his closing statement, arguing that if the defendant pointed the gun at the deceased intentionally and it happened to go off by accident, the defendant was guilty of involuntary manslaughter. Defense counsel objected to the argument by the prosecutor, to which the trial judge responded that the argument was a proper definition of involuntary manslaughter. Both counsel and the court argued:

"MR. PETRELLA: I did not now (sic know). I did not. I stated that—right from the involuntary instruction—where you conclude that if he intentionally pointed a gun at somebody and it accidentally went off, that it wouldn't be involuntary manslaughter? Of course, it would be. Of course, it would be. Of course, it would be.

"THE COURT: Well, involuntary manslaughter . . .

"MR. PETRELLA: Providing the other elements were fulfilled.

"MR. ZIEMBA: What is the Court going to instruct the jury? That accident is a defense. I thought we had that all hammered out.

* * *

"[THE COURT]: Accident is not a defense to the extent that this crime requires the defendant to intentionally point or aim the firearm at the deceased.

"MR. ZIEMBA: Then your Honor has changed his mind?

"THE COURT: I haven't changed my mind. About what?

"MR. ZIEMBA: I thought we had agreed that accident is, according to that definition which I gave to the Court, that accident was a defense to all three of the charges upon which the Court will instruct the jury. I thought we had that all agreed upon.

"THE COURT: Well, only to the extent that the absence of accident is required by this definition.

"What he was telling the jury is that as long as he intentionally points the firearm at the deceased, it doesn't matter if it goes off by accident. There is still involuntary manslaughter."

Defense counsel then argued to the jury in his closing statement that the gun accidently discharged when the defendant jumped back to get out of the way of the deceased who was coming at him with a brick. Counsel also argued that the gun was not necessarily pointing or aimed, although not using those terms, at the deceased at the time of the shooting. In fact, defense counsel argued that perhaps the deceased was bent over at the time of the gun's discharge.

We find that the trial judge was correct and that the judge and prosecutor were in agreement from the beginning as to the correct definition of involuntary manslaughter and the use of accident as a potential defense. We find no error.

Finally, we find no error in the trial court's instruction to the jury supporting defendant's theory of the case. The trial judge properly recognized the proffered instruction as pertaining to self-defense which was not an issue in the case before the jury. Our review of the record made in the trial court convinces us that the instructions, taken as a whole, were fair, balance and impartial.

On the basis that the trial court erred in vacating defendant's conviction of felony-firearm, the cause is remanded to the Wayne County Circuit Court with direction to reinstate defendant's felony-firearm conviction and for resentencing.

REMANDED.

Order of the Michigan Supreme Court
(Filed: May 19, 1983)

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 19th day of May in the year of our Lord one thousand nine hundred and eighty-three.

69763
69764

Present the Honorable
G. MENNEN WILLIAMS,
Chief Justice
THOMAS GILES KAVANAGH,
CHARLES L. LEVIN,
JAMES L. RYAN,
JAMES H. BRICKLEY,
MICHAEL F. CAVANAGH,
PATRICIA J. BOYLE,
Associate Justices.

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

MICHAEL ALBERT KALY,
Defendant-Appellant.

SC: 69763, 69764
COA: 58257, 60173
LC: 79-937139-FM

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because the Court is not persuaded that the questions presented should be reviewed by this Court.

512

STATE OF MICHIGAN—ss.

I, CORBIN R. DAVIS, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the

original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing this 19th day of May in the year of our Lord one thousand nine hundred and eighty-three.

(s) Corbin R. Davis
Clerk

Order of the Michigan Supreme Court
(Filed: August 15, 1983)

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 15th day of August in the year of our Lord one thousand nine hundred and eighty-three.

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(36)

Present the Honorable
G. MENNEN WILLIAMS,
Chief Justice
THOMAS GILES KAVANAGH,
CHARLES L. LEVIN,
JAMES L. RYAN,
JAMES H. BRICKLEY,
MICHAEL F. CAVANAGH,
PATRICIA J. BOYLE,
Associate Justices.

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

MICHAEL ALBERT KALY,
Defendant-Appellant.

SC: 69763-4
COA: 58257, 60173

On order of the Court, the motion by defendant-appellant for reconsideration of this Court's order of May 19, 1983 is considered, and the motion is DENIED, because it does not appear that said order was entered erroneously.

0811

STATE OF MICHIGAN—ss.

I, CORBIN R. DAVIS, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the

Order of the Michigan Supreme Court
(Filed: August 15, 1983)

original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing this 15th day of August in the year of our Lord one thousand nine hundred and eighty-three.

(s) Corbin R. Davis
Clerk